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91-1745

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ELKS NATIONAL FOUNDATION, A LEGAL ENTITY, ET AL.,

PETITIONERS

v.

FRED J. WEBER, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a United States District Court have jurisdiction of a claim under Title 42 U.S.C. §1983 when a state supreme court over objections of lack of due process under the United States Constitution has refused to consider the claim? This question has not been decided by this Court.

2. Should sanctions of $31,531.65 or any penalties, have been assessed against petitioners for presenting the foregoing question to the federal courts?

Parties to the proceeding whose judgment is sought to be reviewed:

Elks National Foundation, a legal entity; Floyd R. Young; Chad Randall Young, by his guardian Sherry L. Young; Joshua Lee Young, by his guardian Sherry L. Young; Michael Edwin Maxwell, by his guardian Shirley G. Johnson; Corinna Nell Maxwell, by her guardian Shirley G. Johnson; Lois E. LaRue Riggins; Sherry L. Young; James Byrd; Joseph Edwin Maxwell, Jr.; Betty Wilson; Mary Jo Byrd; Thomas A. Larson; Gene Huntley and Jef T. Stites,

Petitioners

Defendants and Appellees in the court below: The Honorable Fred J. Weber, in his official capacity as Associate Justice of the Supreme Court of the State of Montana; The Honorable Jean A. Turnage,

in his official capacity as Chief Justice of the Supreme Court of the State of Montana; The Honorable John C. Harrison, in his official capacity as Associate Justice of the Supreme Court of the State of Montana; The Honorable William E. Hunt, in his official capacity as Associate Justice of the Montana Supreme Court; The Honorable Russell C. McDonald, in his official capacity as Associate Justice of the Supreme Court of the State of Montana; The Honorable Leonard H. Langen, in his official capacity as Temporary Associate Justice of the Montana Supreme Court; The Honorable Frank I. Haswell, in his official capacity as Temporary Associate Justice of the Montana Supreme Court; The Honorable Joe L. Hegel, in his official capacity as Judge of the Sixteenth District Court, Fallon County,

Montana; The Honorable Kenneth R. Wilson, in his official capacity as Judge of the Sixteenth District Court, Fallon County, Montana; Continental Oil Company, a corporation; Shell Oil Company, a corporation; Frank Gunnip, Liquidating Trustee of McDonald & Eide, a Delaware Corporation and Robert P. Schwinn,

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 29, 1991. A timely petition for rehearing was denied on January 27, 1992. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). This action was brought pursuant to Title 28, U.S.C. §2201 and §2202 and Title 42, U.S.C.

§1983. The federal district court had jurisdiction under Title 28, U.S.C. §1343. The court of appeals had jurisdiction under Title 28 U.S.C. §1291 which gives that court jurisdiction to hear appeals from final decisions of United States District Courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States shall extend to ... Cases ... [and] to Controversies....

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of

every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall...deprive any person of life, liberty, or property, without due process of law....

Section 1983 of Title 42 of the

United States Code provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage - - - subjects, or causes to be subjected, any citizen of the United States or other person within tne jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable - - -

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court...

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> The records and judicial proceedings of any court of any...State, Territory or Possession [of the United States}...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 2201 of Title 28 of the United States Code provides in relevant part that

> In a case of actual controversy within it jurisdiction...any court of the United States...may declare the rights and other legal relations of any interest party....

STATEMENT OF THE CASE

This case concerns an oil and gas lease on the NW¼ of Section 8, Township 7 North, Range 60 East M.P.M. in Fallon County, Montana, dated June 8, 1953. There is no dispute about the landowner's royalty of twelve and one-half percent (12½%) or overriding royalty of three percent (3%). The dispute in this case is concerned solely with the 84-1/2% working interest.[1] Before oil was discovered on the lease H. W. McDonald was assigned the S½ of the lease (S½NW¼) and an undivided one-half interest in the N½NW¼.[2] Mr. McDonald made an agreement with Continental Oil Company to develop that lease and in connection with that agreement assigned to it a one-half in-

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[1] App. p. 93

[2] App. pp. 98-99.

terest in his ownership.[3]

From the language in the assignment it cannot be determined if Mr. McDonald assigned one-half of what he owned in the lease or a one-half interest in it (one-half interest in it, would include all of his one-half interest in the N½ NW¼).[4] After the discovery of oil and before any payments were made under the lease, Continental Oil Company and Mr. McDonald's assigns entered into a separate contract by letter in which they agreed as to how proceeds from the lease would be divided. Mr. McDonald's ratification agreement was dated May 24, 1962, and the separate contract, made after discovery of oil, was July 16, 1964. Pursuant to the sepa-

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[3] App. p. 101.

[4] Copy of Assignment, App.pp. 199-204.

rate, subsequent contract with Continental, payments were made to the McDonald assignees in the shares that had been agreed to until December 18, 1985, over twenty years.[5] From the time oil was found in 1964, Continental was paid one-half of the working interest proceeds of the oil and gas lease, the McDonald assigns received a three-eighths share (one-half of their original three-fourths share), and one-eighth was paid to Frank Gunnip, the Receiver of the McDonald & Eide Corporation. On April 14, 1983, Frank Gunnip and several of his assignees, filed suit against Continental and Shell Oil Company, the operator of the lease (App. p. 97), claiming to be enti-

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[5] App. pp. 106-107. A copy of the letter contract upon which the McDonald assigns rely is found in the Appendix pp. 204-214.

tled to a one-fourth interest in the lease rather than a one-eighth interest. After this suit was filed Continental and Shell Oil Company commenced withholding a one-eighth interest pending resolution of the litigation.[6] Gunnip was eventually successful in his suit and was ordered to receive a one-fourth rather than a one-eighth interest (App. p. 134). The question presented by this situation was from whose share the did the extra one-eighth share come, Continental's or McDonald's? One of Continental's arguments to Gunnip's suit was that it was entitled to one-half interest because of the McDonald assignment. Gunnip said that the McDonald assignment to Continental was irrelevant to his claim and didn't argue it because his predecessor, McDonald and

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[6] App. p. 106.

Eide, Inc., had owned all the lease, had reserved a one-fourth interest in the assignment to McDonald and Continental was McDonald's assignee.[7] In ruling for Gunnip the Montana Supreme Court said:

> "Continental asserts it is entitled to a 50% interest in the N½ of the NW¼ of the Lease under the ratification agreement with McDonald. However, Continental admits in its brief that it did not adopt this position at the time the ratification agreement was executed in 1964; prior to the time judgment no. 4062 was entered, Continental derived a 25% interest in the

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[7] Statement from Gunnip's Brief, App. pp. 222-224.

N½ of the NW¼ from the Eide and Von DeLinde conveyance and a 25% interest under the ratification agreement. Judgment no. 4062 voided the conveyance from M & E to Eide and Von DeLinde in its entirety, thereby eliminating the 25% interest Continental claimed under assignment from Eide and Von DeLinde. Following judgment no. 4062, Continental continued to assert a 50% interest under the ratification agreement with McDonald.

There remain unresolved issues of material fact regarding the interest of Continental. Although McDonald conveyed an 'undivided one-

half interest' in the Lease under the ratification agreement, Continental admits in its brief that it did not treat its 50% interest in the N½ of the NW¼ as being derived solely from McDonald until judgment no. 4062 was entered. In 1964 McDonald assigned undivided interests to Huntley, Iverson, and Larson. Huntley, Iverson and Larson have claimed under this assignment adverse to the interest Continental now claims under the ratification agreement. A trial must be held to assess Continental's interest considering potential application of adverse possession, waiver and

estoppel.

> The court cannot decide Continental's interest under McDonald's ratification agreement without McDonald's assignees before the court. They must be joined on remand." Gunnip, et al v. Continental Oil Company, et al, a corp., S.C.Mt., September 9, 1986, 727 P.2d 1315. (App. pp. 168-169)

The McDonald assignees were not parties to the litigation and had no part in the selection by the Montana Supreme Court of the claims and defenses which they could urge. After remand the McDonald assignees were joined as parties. They proved the contract of July 16, 1964, which had not previously been be-

fore the court. On the basis of that contract the lower court granted summary judgment for the McDonald assigns on the question of ownership.[8] The McDonald assigns did not rely upon nor argue the matters of waiver or adverse possession and argued estoppel only as it related to the contract upon which they relied.

The Montana Supreme Court in the subsequent appeal reversed the lower court. In that appeal process Continental urged that the lower court had erred

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[8] There is some confusing language in the Court of Appeals Opinion. "A Montana district court considered the effect of the ratification agreement, holding that McDonald conveyed only one-half of his interest in the north half to Continental. The Montana Supreme Court affirmed." (App.p.2) The Montana District Court as the opinion recites ruled that McDonald conveyed only one-half of his interest in the north half to Continental. However, the Montana Supreme Court reversed this ruling. App. pp. 99-102.

because it had considered the contract and ruled it binding and did not limit itself to considering waiver, estoppel and adverse possession. The McDonald assigns in their response to that claim argued that the Montana Supreme Court did not have the power under the Constitution to limit the McDonald assigns' claims without a hearing.

> "The first and, we assume, main argument of Continental is that because of this court's ruling the last time it had this case before it the McDonald assignees have no rights at all unless they can prove adverse possession, waiver or estoppel. They didn't prove any of these matters continental argues and thus

must lose its appeal and this case. (Continental's brief pp. 3-7, 38-39).

Continental says this court so limited the rights of the McDonald assignees when they were not before this court, their property rights had not been placed in issue in any court, they had received no hearing and had not been given an opportunity for hearing with respect to Continental's claims against them.

It is fundamental that before a party may be deprived of any rights at all he is entitled to a notice of hearing and hearing before a tribunal having jurisdiction over

him and his property. See 16 Am.Jur.2d, Constitutional Law, §839 and various applicable United States and Montana Constitutional provisions and cases construing them." (App. pp. 219-221).[9]

The Montana Supreme Court after this claim of due process rights ruled that it had, in its previous opinion, limited McDonald assigns' claims to waiver, estoppel and adverse possession and that the lower court had erred in considering the contractual claims of McDonald saying:

"We remanded so that adverse possession, waiver, and

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[9] The opinion of the Court of Appeals says that the matter of constitutionality was raised in the petition for rehearing. It was raised there and also raised as shown here as soon as the conclusiveness of the previous supreme court opinion was claimed.

> estoppel could be considered as theories under which Continental might have subsequently lost or forfeited any portion of its one half interest. The District Court ignored this Court's opinion and reconsidered the effect of the ratification agreement. We therefore grant supervisory control. (App. pp. 131-132)

The Montana Supreme Court, in its opinion, considered the parties, the lower court, and itself bound by the language of the previous decision. It's short discussion of the evidence was preceded by the statement:

> We have considered whether those (evidentiary materials) might support a theory of

adverse possession, waiver, or estoppel against Continental. (App. p. 132)

and ended with this statement:

"We conclude that plaintiffs have failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental." (App. p. 134).

Consistent with its ruling that McDonald could present evidence only on adverse possession, waiver and estoppel, the court refused to consider whether the evidence submitted constituted specific, written and enforceable contracts between McDonald and Continental.

The McDonald assigns petitioned the Montana Supreme Court for rehearing set-

ting out the claim they made and the constitutional basis for hearing it:

The memorandum is in pertinent part, as follows:

> "The court's decision strips from the McDonald Assignees property which they and their predecessor, Mr. H.W. McDonald, claimed since Mr. McDonald first received it by assignment from the McDonald & Eide Corporation July 12, 1955. Also, the McDonald Assignees under this claim of title received the income from the property from 1964 until 1984.
>
> Even more importantly, if the McDonald Assignees are obliged to repay the income they received from the property they conceivably could lose

the balance of their property and be in debt as well.

We do not suggest that serious or even catastrophic consequences entitle a litigant to relief. He is entitled as a matter of right and law, however, to claim the tribunal pay careful attention to, and follow the law. This is the claim we are advancing in this petition for rehearing.

This court granted supervisory control because the lower court gave a full hearing (hours of argument and many briefs) to the McDonald Assignees and, after such hearing, ruled in their favor

with thorough and meticulous findings, conclusions and judgment. This court said the lower court should not have fully considered the rights of the McDonald Assignees because by the language in the court's previous opinion the lower court was limited to determining if the McDonald Assignees had rights arising out of adverse possession, waiver or estoppel, and could consider no other claims, rights and defenses of the McDonald Assignees.

In so ruling this court committed grave error.

First of all at the time of the rendition of the

previous opinion the McDonald Assignees were not before this court. This court did not have jurisdiction of them and therefore had no right to in any way limit defenses they might wish to interpose or claims they might wish to make.

Secondly, the legal position of the McDonald Assignees was and is entirely different from that of Gunnip. Gunnip was entitled to prevail, we showed because Continental's title was derived from and inferior to that of Gunnip and because of judgments which Gunnip had obtained. The title of the

McDonald Assignees, on the other hand, depended upon an interpretation of the assignment McDonald gave and subsequent agreements between his assignees and Continental. The briefs that were submitted showed that there was different property, different parties, different evidence and different issues in the claims of the McDonald Assignees as distinguished from the claims of Gunnip.

What this court has done is deprive the McDonald Assignees of a day in court basing such denial upon obiter dicta in a case to which they were strangers.

We are aware that this court in refusing to consider most of the material relied upon by the lower court acted pursuant to the urging of Continental. This urging was briefed by the McDonald Assignees. As there was an issue made of this point in the briefs and as the case turned upon this point we request and we feel, under the circumstances, we are entitled to request, that if this court does not grant a rehearing that it, at a minimum, articulate:

1. Why the McDonald Assignees as a matter of common morality and justice

are not entitled to a hearing with respect to their case and their claims and defenses?

2. How the property of the McDonald Assignees could be stripped from them and their rights jeopardized in a proceeding in which they were neither parties nor participants?

3. Why the U.S. and Montana Constitutions relative to due process and the United States statutes relative to civil rights do not apply?

CONCLUSION

The law, when consulted, leads inexorably to the conclusion that the McDonald Assignees are entitled to keep

the property which they and Mr. McDonald have claimed for 34 years and from which they enjoyed all the income for 20 years. They should be given a rehearing and the law should be followed." (App. pp. 136-143).

This petition of the McDonald assignees was denied without comment (App. pp. 56-57). They then filed suit in the United States District Court for the District of Montana under §1983 of Title 42 asserting their constitutional right to a hearing before deprivation of their property had not been extended to them. The suit was primarily against Continental and Shell Oil Company for damages, costs and attorneys fees and against the Supreme Court Justices and

lower courts in Montana to enjoin enforcement of the Supreme Court's judgment. No fees and costs were claimed against the Judges and Justices. (App. pp. 225-244).

The United States District Court for Montana relying on Section 1257 of Title 28 dismissed the case for lack of subject matter jurisdiction and assessed a penalty against the McDonald assigns in the amount of $23,790.65 either under Section 1988 of Title 28,[10] the Civil Rights Act, or as sanctions under Rule 11, Fed.R.Civ.P. (App. p. 29). The McDonald assigns appealed to the United States Court of Appeals for the Ninth Circuit. That court affirmed the lower court and awarded further sanctions against the McDonald assigns in the

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[10] App. p. 40.

amount of $7,741.00. (App. pp. 19-20)

THE NINTH COURT OF APPEALS HAS MISUNDERSTOOD OUR POSITION.

The Ninth Court of Appeals says in its opinion that the McDonald assignees were in the Court of Appeals arguing the ambiguity of the McDonald assignment, that the Montana Supreme had already decided on that instrument's ambiguity and therefore there was no denial of due process. This finding is based upon a misunderstanding of our position. We nowhere in our brief to the Ninth Court of Appeals argued the word "ambiguity". We argued that the McDonald assignees were entitled to have considered a separate contract between them and Oil Company entered into by them (not Mr. McDonald) two years after the McDonald

agreement. This contract was set out verbatim in the Statement Of The Case to the appellate court. The Court of Appeals like the Montana Supreme Court, completely disregarded this important document. The appellate court said:

> "The McDonald assigns here complain, not of the substantive law applied by the Montana courts, but of the procedure by which the state supreme court reached the ambiguity question." (App. pp. 12-13).

We did not complain about procedure but about the Montana Supreme Court's refusal to consider our evidence of title based upon a binding contract of at least equal legal dignity with the assignment upon which Continental relies. In Gunnip the

Montana Supreme Court said that the McDonald assigns must be joined. When they were joined and showed they relied for title upon entirely different documents than had been before the court previously, the Montana Supreme, nevertheless, hewed to its previous criteria, and, as its opinion clearly shows, refused to even consider the McDonald assigns' claims, to say nothing of "hearing" them or "weighing" them.

Both the Montana Supreme Court and the Ninth Court of Appeals reached their conclusions by turning a blind eye to the legitimate rights and contractual claims of the McDonald assigns.

ARGUMENT

We rely upon the 14th Amendment to the United States Constitution and Title 42 U.S.C. §1983 both of which are noted

at the commencement of this brief.

That contracts may be entered into by letter is basic law. See 17 C.J.S., Contracts, § 57. The contract upon which we rely was not a gloss upon a claim of non-ambiguity. It was a separate contract entered into at a different time from the McDonald assignment with different people, wholly independent of the McDonald assignment and of equal legal dignity. This circumstance, which was brought home fully to both the Montana Supreme Court and the Ninth Court of Appeals was totally ignored by both courts. Neither court mentioned the contract nor the implications which flowed from it. Both of them ignore the thorough investigation by the Montana District Court which ruled that there was a contract and that it was controlling.

See Truax v. Corrigan, 64 L.Ed 254, 27 A.L.R. 375, 257 U.S. 312, 42 S.Ct. Rptr. 124, 129:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

See Board of Regents of State Colleges v. Roth, 92 S.Ct. 2701, 408 U.S. 564, 33 L.Ed. 548:

"And a weighing process has long been a part of any determination of

the *form* of hearing required in particular situations by procedural due process."

See Boddie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113:

"...the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."

In the lower court and here we rely upon the case of Selwin A. Robinson, et al., v. George R. Ariyoshi, et al., 753 F.2d 1468 (9th Cir. 1985) and this Court's management of that case on application for Writ of Certiorari.

The Robinson case, as the case at bar, concerned property rights and a limitation of those rights by a state

supreme court. The property rights were water rights and the problem with respect to them arose when the Hawaiian Supreme Court ruled that it was going to apply the common law of England rather than the law which had been applied previously. After the case was finally decided by the Supreme Court of Hawaii and after certiorari had been refused by the United States Supreme Court the parties adversely affected by the Hawaiian Supreme Court decision sued in Federal District Court for Hawaii because their constitutionally protected property rights had been affected and because the Hawaiian Supreme Court had ignored and refused to pass upon the constitutional claims which they had presented. The Robinson case for practical purposes is identical to the case at bar. The

primary difference between the Robinson case and the case at bar is that in the Robinson case the plaintiffs sued the officials charged with enforcing the law while in the case at bar petitioners sued the supreme court which issued the opinion and the lower court members who were charged with enforcing it. We do not consider this difference to be significant.[11] The Ninth Court of Appeals in the Robinson case, said that, under the circumstances, the federal district court did have subject matter jurisdiction to enjoin the implementation of the Hawaiian Supreme Court decree. It said, in relating pertinent facts:

"The parties adversely

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[11] Courts may be sued for prospective injunctive relief, Pulliam v. Allen, 1983, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565.

affected by the holding in McBryde I petitioned for rehearing and the state supreme court allowed a rehearing on the limited issue of the proper construction of Hawaii Rev. Stat. @ 7-1 (a century-old territorial statute dealing largely with drinking water and rights of way on roads over private lands) and the meaning of the word 'appurtenant.' The parties attempted to enlarge the scope of the rehearing to include state and federal constitutional claims but their attempt was summarily rejected. See Robinson v. Ariyoshi, 441 F. Supp. 559,

564 (D. Hawaii 1977), (Robinson I). Rehearing was denied in McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 517 P.2d 26 (1973) (McBryde II). n2 In due course the Supreme Court of the United States denied review, McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974) (McBryde III), and in 1974 this litigation began in the United States District court for the District of Hawaii. The decision in the district court permanently enjoined the named state officials from enforcing against these plaintiffs any 'new law' announced in McBryde I and II. Robinson I, 441 F. Supp. at

586.

n2 The 'opinion' in McBryde II, apart form formal recitals consists of the following:

> Arguments of the parties were heard at the hearing had on September 18, 1973. After careful consideration of the briefs and arguments presented at the hearing, we find no reason to change the decision filed herein."

After setting forth the facts the court of appeals, in Robinson, ruled as follows:

"Res judicata

With reference to a res judicata bar against these claims, the question becomes more complex. It is settled that "horizontal" appeals will not lie to the United States District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). See also District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). However, Rooker made it clear that the only constitutional questions arising from a state proceeding on

which the Supreme Court considered itself to be the final arbiter, were those that "actually arose in the cause" in which a full hearing was held and where the judgment was responsive to the issues. 263 U.S. at 415. Otherwise, if Rooker were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, Rooker would swallow the "full and fair opportunity to litigate" limitation to res judicata clearly established elsewhere by the Supreme Court. See e.g., Allen v. McCurry, 449

U.S. 90, 95 (1980).

Consistent with that analysis, we have read Rooker not as a jurisdictional barrier but as an application of res judicata. See e.g., Williams v. Washington, 554 F.2d 369, 371 (9th Cir. 1977); Hutcherson v. Lehtin, 485 F.2d 567, 569 (9th Cir. 1973); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481, 485 (9th Cir. 1973), cert. denied, 415 U.S. 916 (1974). The Supreme Court, in one of two majority opinions which cited Rooker did so in a discussion of res judicata. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282-83

(1946). The other, more recent, Supreme Court majority citation of Rooker has been in a jurisdiction context, with acknowledgment of the res judicata implications. Feldman, 460 U.S. at 476. In Feldman, the Supreme Court held that where allegations underlying a state's highest court's final judicial decision are "inextricably intertwined" with issues presented to a federal court, the federal court has no jurisdiction over those issues, even if those challenges included constitutional claims. Id. as [at] 486.

Faced with the task of deciding our

power to review constitutional issues which arise from a state court proceeding, we view the res judicata requirement of full and fair opportunity to liti-gate [litigate], and the Feldman "inextricably intertwined" barrier to federal jurisdiction as two sides of the same coin. Under the rubric of either "jurisdiction" or "res judicata," the crux of the question is whether there has

already been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible "appeal" from the state court decision. See Reynolds v. Georgia, 640 F.2d 702, 705-06 n.2 (5th Cir.) cert. denied, 454 U.S. 865 (1981). If no consideration has been given, or any decision on the matter is ambiguous,

it is unlikely that the issues presented to the state high court and to the federal court are so "inextricably intertwined" that the federal court cannot take jurisdiction. Nor is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of res judicata.

Proceeding under the doctrinal umbrella of res judica-

ta, we find that Robinson's due process claims were not and could not have been litigated in the McBryde state proceedings because the Hawaii Supreme Court refused to consider Robinson's federal claims. Robinson I, 441 F. Supp. at 564. In Haring v. Prosie, 462 U.S. 306, 103 S. Ct. 2368, 2373 (1983), the Supreme Court noted that in a @ 1983 action, collateral estoppel effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated

inability or unwillingness to protect federal rights. We do not hesitate to apply the same caveat in this res judicata context. The principle is fully consonant with the philosophy expressed in the Restatement of Judgments which provides for an exception to the general rule of preclusion where "[a] new determination of the issue is warranted by differences in quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them." Restatement (Second) of Judgments @ 28(3).

Turning to ap-

plication of the Feldman doctrine, we cannot see how federal constitutional issues which the state court refused to consider on a petition for rehearing are at all, let alone inextricably, intertwined with a previously reached state court judgment on riparian rights. The Hawaii Supreme Court decision to deny rehearing of the substantive questions of state law may or may not have

been intertwined with its decision also to deny hearing of federal constitutional claims. We are not asked to decide whether the composite denial of rehearing and refusal to hear was correct; the Supreme Court has already declined to review the matter. McBryde III, 417 U.S. 962. We are asked to review district court findings about constitutional claims which themselves

were never decided by a state court, intertwined or otherwise. n3

n3 If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims. Wood v. Orange Coun-

ty, 715 F.2d 1543, 1546-47 (11th Cir. 1983) cert. denied, 104 S. Ct. 2398 (1984). We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court in Wood, we are concerned that "[s]uch a re-

> sult might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably contrary to the requirement of due process." Id. at 1547.

Thus we are in no danger of serving impermissibly in an appellate role vis-a-vis the Hawaii state court, or of reopening matters which have been litigated and decided in state court. Where a state

court has refused to entertain federal constitutional claims, a federal court violates the precepts of neither subject matter jurisdiction nor res judicata by hearing those claims."

The defendants in the Robinson case petitioned this Court for Certiorari. Most of their arguments were directed toward the proposition that the Federal District Court of Hawaii did not have jurisdiction. The response of Robinson to those claims was as follows:

"(Ariyoshi, et al.) rely on the cases of *Rooker v. Fidelity Trust Co.*, 263 U.S. 713 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U. S. 462 (1983) as

standing for the proposition that a state supreme court without a hearing can divest property rights to the state without compensation and contrary to proper federal court adjudications, and the only redress a private citizen has is the chance that a petition for certiorari might be granted in this Court. Neither *Rooker* nor *Feldman* require such a result. The Court has often ruled that every litigant should have a full and fair opportunity to litigate his constitutional claims. *See Haring v. Prosise*, 462 U.S. 306 (1983). Certainly the remand in *Feldman* with

instructions to consider Feldman's constitutional challenge to bar admission rules clearly impled that Feldman was entitled to a full and fair opportunity to litigate constitutional questions that might have been raised before the District of Columbia Court of Appeals.

If the federal constitutional claims were not given a full and fair hearing, they were not 'inextricably intertwined' with the *McBryde* judgment so as to bar jurisdiction in the District Court as were certain claims in *Feldman*. Whether *Rooker* and *Feldman* stand for more than an appli-

cation or *res judicata*, they cannot be read to prevent Plaintiffs from having a full and fair opportunity to litigate federal constitutional claims.

The District Court found that Plaintiffs had no hearing on their constitutional claims in the Supreme Court of Hawaii. This finding cannot be refuted. In fact, the State of Hawaii argued in this Court in its Memorandum to Dismiss Appeal in *McBryde*:

> 'Oral argument was duly limited to the issues specified in the Order of June 18, 1973...The *per*

curiam affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions.'

(Ariyoshi, et al.) argue that because Plaintiffs received four months from the Supreme Court of Hawaii to prepare their petition for rehearing, which petition was summarily denied with respect to Plaintiffs' constitutional claims, Plaintiffs have received due process from the Supreme Court of Hawaii and therefore cannot have any hearing on their federal claims in the United States

District Court. Such an argument seems ludicrous and is contrary to any decisions of this Court. A refusal to grant a hearing is not the equivalent of a full and fair hearing on constitutional issues.

(Robinson, et al.) never had a hearing until the United States District Court heard their case and upheld their federal rights against the unconstitutional claims of the State officials. The United States District Court had jurisdiction to hear such claims and was the only court willing to do so.

Due process requires a

full and fair hearing by an unbiased tribunal. *See Gibson v. Berryhill*, 411 U.S. 564 (1973)....

Even if refusal to grant a rehearing may be considered a hearing on the merits, the District Court had jurisdiction to hear the constitutional claims. Plaintiffs' constitutional claims were not fairly considered by the Supreme Court of Hawaii, and neither *res judicata*, collateral estoppel nor the '*Rooker* doctrine' should bar the hearing of those claims by the federal courts. The rule is clear with respect to collateral estoppel and logically to

other forms of *res judicata*.

> 'Moreover, additional exceptions to collateral estoppel may be warranted in Section 1983 actions in light of the "understanding of Section 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights.' [*Allen v. McCurry*, 449 U.S. at 96, 66 L.Ed. 308, 101 S.Ct. 441].

Haring v. Prosise,

462 U.S. at 313-314.

As stated in *Allen v. McCurry*, 449 U.S. 90, 95 (1980):

> ...'[O]one general limitation of the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.'

This Court reiterated in *Kremer v. Chemical Construc-*

tion Corp., 456 U.S. 461 (19-82):

> 'We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue.'

Id. at 480-81.

The District Court had jurisdiction to determine whether Plaintiffs had a full and fair hearing, and *Feldman* and

Rooker cannot be read to deny the District Court's jurisdiction to determine whether or not such a hearing took place. The District court correctly decided that no hearing occurred and decided Plaintiffs' constitutional claims."[12]

This Court in reversing the case did not rule that the federal court did not have jurisdiction but that the judgment of the Hawaiian Supreme Court was not final. 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560.

Neither the Court of Appeals nor the Montana Supreme Court extended to the

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[12] Brief of Robinson et al. in this Court. (George R. Ariyoshi, Governor, State of Hawaii, et al., v. Selwyn A. Robinson, et al., Supreme Court No. 85-406.)

McDonald assigns a meaningful hearing on their contract claims. That they had a contract is clear. It is also clear that they relied upon and proved it to both courts. Neither court, obviously, gave it any consideration at all. Both courts, apparently, considered it to be some sort of irrelevant gloss to a claim of non-ambiguity.

The McDonald assigns have had no meaningful hearing by the two federal courts and the Montana Supreme Court.

SANCTIONS

The advisory comment to amended Rule 11 F.R.Civ.P under which the District court assessed sanctions reads as follows:

> "The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or

legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on - - -whether the pleading, motion, or other paper was based on a plausible view of the law;

- - -

The word 'sanctions' in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers."

The lower court awarded full attorneys fees on the basis of Title 42 U.S.C. §1988 and Rule 11 Fed.R.Civ.P. A case which has ruled that attorneys fees are

not awarded when a civil rights case is dismissed is Hidhdahl v. Gilpin County Department of Social Services, et al., (USDC Colo. 1988) 699 F.Supp 846, affirmed Court of Appeals 10th (1991) 938 F.2d 1150. Whatever the Court may decide on the merits of this appeal we respectfully suggest the imposition of the enormous sanctions should be reversed.

CONCLUSION

This case concerns an important point of federal law which this Court has not decided. We ask this Court to find that a federal district court does have jurisdiction under Title 42 U.S.C. §1983 when a state supreme court refuses to give a meaningful hearing to a right protected by the United States Constitution.

We ask also that this Court reverse

the sanctions which were imposed.

Respectfully submitted this 27th day of April, 1992.

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